Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1614

WILBERT LEE BALLARD,
Appellant,

V.

BOARD OF TRUSTEES OF THE POLICE PENSION FUND
OF THE CITY OF EVANSVILLE, INDIANA,
Appellee.

On Appeal from the Supreme Court of Indiana

MOTION OF APPELLEE TO DISMISS APPEAL

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Appellee moves the Court to dismiss the appeal herein on the following grounds:

I. THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS NOT EXPRESSLY PASSED ON BY THE SUPREME COURT OF INDIANA.

A review of the decision in *BALLARD VS. BOARD OF TRUSTEES OF THE POLICE PENSION FUND OF THE CITY*

OF EVANSVILLE, INDIANA, — Ind. —, 324 N. E. 2d 813 (1975), discloses that the Supreme Court of Indiana did not pass on Appellant's Proffered Federal issue of whether the statute here involved, *viz.* Acts of the Indiana General Assembly of 1925, Chapter 51, § 5, p. 167, IC 19-1-24-5, violates the Federal Constitutional prohibition against bills of attainder. U. S. Const. Art. I, § 10 (1). The Supreme Court of Indiana rested its decision on a non-federal ground, specifically that the statute is not unconstitutional under the Indiana Constitution, as working corruption of the blood, or forfeiture of estate. Constitution of the State of Indiana, Article 1, § 30. "For all of the foregoing reasons, we find that the Police Pension Act does not violate our constitutional prohibition against forfeiture of estate. We grant transfer, vacate the opinion and judgment of the Court of Appeals and reinstate the judgment of the trial court." 324 N.E. 2d at 817.

For this reason, the appeal must be dismissed.

"It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In *CROWELL VS. RANDELL*, 10 Pet 368, 9 L. Ed. 458 (1836), Justice Story reviewed the earlier cases commencing with *OWINGS VS. NORWOOD'S LESSEE*, 5 Cranch. 344, 3 L. Ed. 120 (1809), and came to the conclusion that the Judiciary Act of 1789, c 20 § 25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. *'If both of these do not appear on the record, the appellate jurisdiction fails.'* 10 Pet 368, 391, 9 L. Ed. 458, 467." *CARDINALE VS. LOUISANNA*, 394 U.S. 437, 438, 22 L. Ed. 2d 398, 400, 89 S. Ct. 1162 (1969). (Emphasis added)

The Supreme Court of Indiana not having decided, or even discussed, the federal issue herein advanced, the appeal should be dismissed.

II. THE JUDGMENT OF THE SUPREME COURT OF INDIANA RESTS ON AN ADEQUATE NON-FEDERAL BASIS.

The Supreme Court of Indiana held that the statute here involved is not in violation of the Indiana Constitution's prohibition against a conviction working corruption of blood, or forfeiture of estate, as argued by Appellant. That the federal question herein advanced was offered by Appellant as merely an afterthought in his Brief before the Indiana Supreme Court is shown by the complete lack of discussion of that issue in the decision below. Because the judgment rests on an adequate non-federal basis, the appeal should be dismissed. This Court has said on many occasions that when a state decision is founded upon a non-federal basis, the court will decline to exercise jurisdiction. The "Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on an independant state grounds." *HERB VS. PITCARIN*, 324 U.S. 117, 125, 89 L. Ed. 789, 794 (1945). See also *PASCHALL VS. CHRISTIE-STEWART, INC.*, 414 U.S. 100, 38 L. Ed. 2d 298, 94 S. Ct. 313 (1973); *HENRY VS. MISSISSIPPI*, 379 U.S. 443, 13 L. Ed. 2d 408, 85 S. Ct. 564 (1965).

III. THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The statute here attacked cannot amount to a bill of attainder due to the lack of any legislative trial or finding of guilt and due to the lack of punishment.

UNITED STATES VS. BROWN, 381 U.S. 437, 14 L. Ed. 2d 484, 85 S. Ct. 1707 (1965), describes the constitutional prohibition against bills of attainder as "an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply - - trial by legislature." 381 U.S. at 442, 14 L. Ed. 2d at 488. There can be no trial either by the judiciary or the legislature without a

defendant and a fact situation. The Indiana General Assembly had neither when it passed the law here under consideration in 1925. The Indiana General Assembly did not intend to punish Wilbert Lee Ballard, or any person like him, and made no determination that Ballard or any other person was guilty of an offense, but merely established an eminently reasonable ground of eligibility for police pensions. Similar regulatory provisions, challenged as bills of attainder, have been upheld in *FLEMMING VS. NESTOR*, 363 U.S. 603, 4 L. Ed. 2d. 1435, 80 S. Ct. 1367 (1960), and by a three judge court in *THOMPSON VS. WHITTIER*, 185 F. Supp. 306 (D.D.C. 1960).

Even ignoring the "legislative trial" characteristic of a bill of attainder, Appellant's contention cannot withstand scrutiny under the definition that such a bill is "a legislative act which inflicts *punishment* without a judicial trial." (Emphasis added.) *CUMMINS VS. MISSOURI*, 71 U.S. (4 Wall.) 277 (1867). Without punishment there can be no bill of attainder. *TROP VS. DULLES*, 356 U.S. 86, 2 L. Ed. 2d. 630, 78 S. Ct. 590 (1958). This Court has previously decided, in *PENNIE VS. RIES*, 132 U.S. 464, 33 L. Ed. 426, 10 S. Ct. 149 (1889) that the loss of a police pension does not amount to punishment, but is merely the loss of a gratuity. In that case, the Court considered a California statute which was similar to Indiana's in that it required mandatory contributions from police for their own pension fund. In the face of the contention that a deceased police officer had, at the time of his death, a vested property right in the pension and that a subsequent repeal of the law establishing the pension deprived his widow of property without due process of law, the Court held that the mandatory contributions were never owned by the police officer because he "had no such power of disposition over (the contributions) as always accompanies ownership of property." 132 U.S. at 470. Likewise, Ballard had no power of disposition over his mandatory contributions; the money remained a part of public funds beyond his power to control. This is the rule in Indiana.

"(Such a) pension fund is accumulated by taxation, by contributions and awards of various sorts, and by enforced contributions by members of the police force. It is established by the great weight of authority in other jurisdiction(s), including the Supreme Court of the United States, that such provisions are gratuities; that they involve no agreement of the parties and create no vested rights, notwithstanding compulsory contributions by the parties in the form of allotted sums retained out of the members' pay . . ." *KERN VS. STATE EX REL. BESS,212 Ind. 611, 614-615*, 10 N.E. 2d 915, 917 (1937). Citing *PENNIE VS.REIS, supra.*

See also *DODGE VS. BOARD OF EDUCATION*, 302 U.S. 74, 82 L. ed. 57, 58 S. Ct. 98 (1937); *LYNCH VS. UNITED STATES*, 292 U.S. 571, 78 L. Ed. 1434, (1934); *UNITED STATES EX REL BURNETT VS. TELLER*, 107 U.S. 64, 27 L. Ed. 352 (1883); *MacLEOD VS. FERNANDEZ*, 101 F. 2d 20 (1st Cir. 1938); *KLAMM VS. STATE EX REL. CARLSON*, 235 Ind. 289, 126 N.E. 2d 487 (1955); *JONES VS. CHENEY*, 489 S.W. 2d 785 (Ark. 1973); and 70 C.J.S. Pensions § 1.

In *FLEMMING VS. NESTOR*, *supra*, the Court upheld termination of Social Security Benefits payable to an alien deported on the ground of Communist Party membership because the withdrawal of such benefits was not punishment for his being a Communist Party member or because of his deportation, but amounted to the"mere denial of a non-contractual governmental benefit." 363 U.S. at 617, 4 L. Ed. 2d at 1448. In *THOMPSON VS. WHITTIER*, *supra*, a three judge court upheld the validity of a statute which was attacked as a bill of attainder and under which a veteran's disability benefits were terminated merely on the basis of an administrative finding that he had aided an enemy of the United States during the Korean conflict.

Likewise, the denial of a police pension to Appellant in this case on the grounds of his conviction of a felony - specifically, second degree murder - does not amount to punishment and is

merely a valid regulation of eligibility for such pension. In light of the established law that a bill of attainder must involve punishment and that the loss of a governmental pension is the loss of a gratuity, and in light of Appellant's admission on page 6 of his Jurisdictional Statement that his interest in the pension was not vested and did not arise as a contractual right, his contention that the statute under consideration amounts to a bill of attainder must fail. Even Appellant's contention that his "interest in the pension, while not being vested or arising as a contractual right, is substantial enough to be afforded constitutional protection," (Jurisdictional Statement at page 6), finds its support in a statement of this Court concerning due process of law, not bills of attainder. The statement in *FLEMMING VS. NESTOR, supra,* from which Appellant apparently drew this reference, came from a comment that "the interest of a covered employee under the (Social Security) Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause." 363 U.S. at 611. Appellant has not contended that he has been deprived of due process.

Finally, as this court said in *FLEMMING, supra,*

> "Only the clearest proof (can) suffice to establish the unconstitutionality of a statute on (the ground that it amounts to a bill of attainder). Judicial inquiries into Congressional motives are at best a hazardous matter, and when that inquiry seeks to go beyond objective manifestations it becomes a dubious affair indeed. Moreover, the presumption of constitutionality with which this enactment, like any other, comes to us forbids us lightly to choose that reading of the statute's setting which will invalidate it over that which will save it. 'It is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void.' *FLECTCHER VS. PECK,* (U.S.) 6 Cranch 87, 128, 3 L. Ed. 162, 175." 363 U.S. at 617, 4 L. Ed. 2d at 1448.

Appellee respectfully submits that no such proof has been introduced in this case, that no such proof is available, and that therefore, Appellant's Jurisdictional Statement presents no substantial federal question. Wherefore, Appellee moves that the Court dismiss the appeal.

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